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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY RYAN VASQUEZ,

Defendant and Appellant.

C065319

(Super. Ct. No.
CRF086038, CRF064539,
CRF073015)

A simple sale of marijuana deteriorated into attempted murder and robbery when defendant Anthony Ryan Vasquez shot Pablo S. in the chest. An information charged defendant with attempted murder, second degree robbery, assault with a firearm, and attempting to dissuade a witness. (Pen. Code, §§ 664/187, subd. (a), 211/212.5, subd. (c), 245, subd. (a)(2), 136.1, subd. (a)(2).)¹ A jury found defendant guilty of second degree

¹ All further statutory references are to the Penal Code.

robbery, assault with a firearm, and attempting to dissuade a witness. The court sentenced defendant to five years in state prison for the robbery, seven years to life for attempting to dissuade a witness, and 25 years to life for the section 12022.53, subdivision (d) enhancement. Defendant appeals, arguing (1) insufficient evidence supports his robbery conviction, (2) instructional error, (3) insufficient evidence supports the jury's finding that he intentionally discharged a firearm, (4) ineffective assistance of counsel, (5) the court erred in denying his request to strike the gang enhancement, and (6) the information was improperly amended. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Two Prior Cases

In July 2007 defendant pleaded no contest to two felonies: assault by means of force likely to cause great bodily injury and manufacturing, importing, or possessing for sale prohibited weapons (metal knuckles). (Super. Ct. Yolo County, case Nos. 064539 and 073015, respectively; §§ 245, subd. (a)(1), 12020, subd. (a)(1).) Defendant was admitted to probation for a period of four years and served 180 days in county jail.

Defendant was charged with violating his probation in May 2008, and the court revoked probation in both cases.

Main Case on Appeal

In May 2008 defendant arranged to buy marijuana from Pablo S. Defendant pulled out a gun, the pair struggled, and defendant shot Pablo in the chest.

An information charged defendant with attempted murder (count 1), second degree robbery (count 2), assault with a firearm (counts 3 and 4), and attempting to dissuade a witness (count 5). In addition, the information alleged as to all counts that the crimes were committed for the benefit of a criminal street gang, and that defendant personally discharged a firearm, causing great bodily injury, as to count 1. (§§ 186.22, subd. (b)(1), 12022.53, subd. (d).) As to counts 1, 2, and 3, the information alleged that defendant personally inflicted great bodily injury, and as to counts 3 and 4, that defendant personally used a firearm. (§§ 12022.7, subd. (a), 12022.5, subd. (a); Super. Ct. Yolo County, case No. 086038.)

Defendant entered a plea of not guilty. The following evidence was introduced at trial.

The Incident. Pablo sold marijuana and cocaine. He received a call from defendant, who wanted to buy marijuana. They agreed to meet at an apartment complex for a "stop and go" transaction; defendant was to purchase a quarter pound of marijuana.

Pablo, his girlfriend M.L., and his brother Julian drove to the assignation in Julian's car, a Chevy Tahoe. As they arrived, they saw defendant walking down the stairs. Pablo told defendant to get into the car and defendant complied, sitting in the back seat next to M.L. Pablo's brother sat in the driver's seat with Pablo next to him.

Pablo asked defendant to "show [him] some money," and defendant asked to see the marijuana. The marijuana was packed

in two bags; Pablo placed one of the bags on the car's center console.

Suddenly, defendant pulled out a gun and demanded that Pablo give him everything. Pablo reached for the bag of marijuana in defendant's hands and the two struggled.

Defendant shot Pablo in the chest. Pablo recalled seeing the gun and being blinded by a flash, but he did not hear anything. Pablo drifted in and out of consciousness, but he remembered defendant jumping out of the car and running away. Pablo's brother drove to the hospital, where Pablo was treated for life-threatening injuries.

M.L. testified she saw defendant reach over and grab the marijuana from the console. Pablo and defendant struggled over the drugs, and defendant pulled out a gun, shooting Pablo.

As defendant was getting out of the car, M.L. grabbed his shirt. Defendant pointed the gun at her and got out of the car. Pablo's brother drove them to the hospital. Later, a woman confronted M.L., told her not to testify, and beat her up.

Other Witnesses. Bryanna C., eight years old, lived with her mother in the apartment complex where the shooting occurred. One night she heard something that sounded like fireworks and saw a spark. Bryanna looked out her window and saw a man standing a few feet away from a truck, pointing something at another person who was standing closer to the vehicle. She ran and told her mother someone had been shot.

Although Bryanna described the man to officers after the shooting, she could not identify defendant at trial. Bryanna

told the police three days after the incident that she heard a pop, looked out the window, and saw a man pointing a gun at someone's head. The man ran away. She identified defendant in a photo lineup as the man with the gun.

The night of the shooting, Kristine Stapleton hosted a party nearby. Stapleton was a friend of defendant but could not recall at trial if he was at the party. However, Stapleton had told police that defendant, who was drunk, went outside around 9:00 p.m. to "handle something." Stapleton heard a "pop," looked out, and saw defendant standing beside a black vehicle. There were some "Mexican guys" in the front seat. Defendant, yelling, waved a gun. He put the gun in his waistband and ran back into the apartment. Defendant told Stapleton, "I think I shot somebody."

At trial, Stapleton denied being threatened about testifying. However, prior to trial, Stapleton told an investigator that she had been threatened on three occasions about the case and that she did not want to testify.

Defendant's father, Ronald Vasquez, told the police that defendant's mother, Diana Dawson, had confided in him that defendant admitted shooting someone and needed a place to hide. At trial, Ronald Vasquez and Dawson denied defendant had made any such statements.

Subsequent Events. Officers found a .40 caliber Smith and Wesson expended cartridge on the floor of the Tahoe behind the passenger seat. An anonymous caller stated the victim had put a gun to the shooter's head.

While defendant was incarcerated, authorities searched a fellow inmate and found a letter containing defendant's name, with the jail's address as the return address. The letter, written that month, was addressed to defendant's mother and discussed threatening Stapleton and M.L. In the letter, defendant tells his mother, "let Debrahs sister know what the fuck and she better not fucking come to my trial or else And find out from Tasha or Steven where [M.L.] live she stay with her mom they know where their mom stays then let the homies know and if this shit going to trial and it aint lookin good and she snitchin, tell one my homies fuck they shit up cocktails and all or something. Cuz this shit needs to start changing for the best and not the fucking worst." (*Sic.*)

Gang Evidence. Officer Ronald Cordova, a gang expert, testified regarding the Norteño gang.² According to Cordova, agencies identify a person as a gang member through the validation process. Cordova had previously validated defendant as a member of the Norteño gang, noting defendant had gang tattoos, had been in the company of other gang members, displayed gang graffiti on personal items, and had been involved in gang-related crimes.

In Cordova's opinion, defendant's letter to his mother was consistent with gang activity, in that it was an attempt to

² The parties stipulated that Cordova was a gang expert.

intimidate a witness in the case. Cordova also believed defendant's crimes benefitted the Norteño gang.

Defense Case. Following the shooting, an officer received information that an anonymous person at the local high school had information about the incident. This person said "some guy" who was selling marijuana got shot, the shooter had been trying to steal the marijuana, and defendant was the shooter. According to this source, the victim pulled a gun and put it to defendant's head, then defendant shot the victim, who was in the front seat.

M.L. did not identify defendant as the shooter to anyone in law enforcement until she was in court in April 2009. When asked for an explanation, M.L. said she could not be sure and did not recognize defendant's mouth and mustache until she was in court.

A licensed private investigator testified it was very common for individuals selling drugs to arm themselves. The investigator also testified that if a person looked at a photo lineup for about 30 seconds, pointed to a photo, and then stated, "I think that's him," it would not be a positive identification sufficient to obtain a warrant. He also testified 75 percent of wrongful convictions are the result of false identification.

Verdict and Sentencing. The jury found defendant guilty on counts 2 (second degree robbery), 3 (assault with a firearm), and 5 (attempting to dissuade a witness) and found true the section 12022.53, subdivision (d) allegation as to count 2, the

section 12022.7 allegations as to counts 2 and 3, the section 12022.5, subdivision (a) allegation as to count 3, and the section 186.22, subdivision (b) allegation as to count 5. The jury was unable to reach a verdict as to the remaining counts and enhancement allegations, and the trial court declared a mistrial as to those matters. The trial court also found defendant in violation of probation in case Nos. 064539 and 073015.

The court sentenced defendant to a determinate term of five years and an indeterminate term of 32 years to life in prison: on count 2, five years plus an indeterminate term of 25 years to life on the section 12022.53, subdivision (d) enhancement; and for count 5 and the section 186.22, subdivision (b) enhancement, a consecutive seven years to life. The court stayed the sentences on count 3, on the section 12022.7 enhancements on counts 2 and 3, and on the section 12022.5 enhancement on count 3.

In case No. 064539, the court terminated probation and imposed a one-year term, to run consecutively. In case No. 073015, the court imposed an eight-month term, to run consecutively.

Defendant filed a timely notice of appeal.

DISCUSSION

SUFFICIENCY OF THE EVIDENCE

Robbery

Defendant challenges his robbery conviction, arguing the evidence failed to establish the taking element required to find

him guilty of robbery. Specifically, defendant contends there was insufficient evidence he ever exercised "dominion and control" over the marijuana.

In reviewing a defendant's challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence. Substantial evidence is evidence that is credible, reasonable, and of solid value, such that a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

We do not reassess the credibility of witnesses, and we draw all inferences from the evidence that supports the jury's verdict. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Unless it is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) To convict defendant of robbery, the prosecution must prove that defendant took property that was not his, the property was taken from another person's possession and immediate presence, the property was taken against the person's will, defendant used force or fear to take the property, and when defendant used force or fear to take the property he intended to deprive the owner of it permanently or to remove it from the owner's possession for so extended a period of time

that the owner would be deprived of a major portion of the value or enjoyment of the property. A defendant takes something when he or she gains possession of it and moves it some distance. The distance moved may be short. (CALCRIM No. 1600.)

Defendant argues insufficient evidence supports the jury's finding that he exercised dominion and control over the marijuana at the heart of the robbery. According to defendant, there was no evidence as to whether he had physical possession of the marijuana for any period of time. However, at trial, two witnesses testified that defendant reached over and took the marijuana off the car's center console.

M.L., Pablo's girlfriend, stated her boyfriend put the marijuana on the console. Defendant reached over and took the marijuana. He then pulled out a gun and shot Pablo.

Pablo testified that after defendant pulled out a gun, Pablo reached for the bag of marijuana he thought was in defendant's hand. As they struggled, defendant shot Pablo.

Both witnesses stated defendant possessed the marijuana, albeit for a brief time, during the altercation. In the face of this testimony, defendant faults the prosecutor's closing argument for erroneously stating defendant took the drugs with him when he fled.

The prosecutor stated: "So the facts for the robbery we have to show is that the defendant took property from Pablo [S.], in this case the bag of marijuana against his will by force or fear, and that at the time the defendant took that he intended to permanently deprive the victim of that property.

[¶] And you heard that he grabbed the bag of marijuana, and after he shot Pablo he took it with him when he got out of the car. It is doubtful that he ever intended to bring it back. Someone who steals something like that after shooting its owner, probably not going to return it."

Defendant argues the evidence did not establish that he took the drugs with him when he left. He accuses the prosecution of misstating the evidence and, as a side note, also argues the evidence is "unclear" as to whether defendant exercised any control over the marijuana.

However, regardless of whether defendant left the vehicle with the drugs, all the prosecution need establish was that defendant exercised dominion over the marijuana. The evidence at trial supported the jury's finding that defendant exercised dominion over the marijuana prior to shooting Pablo. Any removal of personal property, however brief or slight, constitutes a taking, even if the property was not removed from the physical presence of the victim. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060.) We find sufficient evidence to support defendant's robbery conviction.

Intentional Discharge of a Firearm

Defendant also contends insufficient evidence supports the enhancement for intentionally discharging a firearm during the commission of a robbery. Accordingly, he argues the enhancement must be stricken.

To impose an enhancement under section 12022.53, subdivision (d), the jury must find sufficient evidence that

defendant personally discharged a firearm during the commission of a robbery, defendant intended to discharge the firearm, and defendant's act caused great bodily injury. (CALCRIM No. 3149.)

Defendant focuses on M.L.'s testimony that she remembered the day of the incident "[b]ecause I was involved in an accident with my boyfriend getting shot."³ Defendant notes M.L. also testified everything happened in "one fluid event" and it was "[a] big blur." Defendant also cites Pablo's testimony that after defendant pulled out a gun and demanded everything, the pair struggled and Pablo was shot. Defendant contends this testimony could lead a reasonable trier of fact to conclude the gun discharged accidentally.

However, in considering whether sufficient evidence supports the finding of intentional discharge of a firearm, we view the evidence in the light most favorable to the judgment. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496-497.)

Here, there was evidence that only defendant was armed when the incident took place. After Pablo produced the drugs, defendant drew his gun and demanded Pablo give him everything. When Pablo reached for the bag of marijuana that defendant held, the pair struggled and defendant shot Pablo. Defendant fled to Stapleton's apartment and said, "I think I shot somebody." Defendant's father told officers his son admitted to his mother

³ When asked why she described the incident as an accident, M.L. explained: "Well . . . we didn't go there for him intentionally to get shot."

that he had shot someone.⁴ Viewing the evidence in the light most favorable to the judgment, we find sufficient evidence supports the jury's finding that defendant intentionally discharged a firearm during the robbery.

INSTRUCTIONAL ERROR

Attempted Robbery

Defendant faults the trial court for failing to instruct sua sponte on the lesser included offense of attempted robbery. This failure, defendant asserts, requires reversal of his robbery conviction.

The court must instruct, even in the absence of a request, on the general principles of law relevant to the issues raised by the evidence. These general principles refer to those principles closely and openly connected with the facts before the court and which are necessary to the jury's understanding of the case. (*People v. Seden* (1974) 10 Cal.3d 703, 715.) However, the court is under no duty to instruct on points of law not relied on by the parties. Before giving the instruction, the court must find legally sufficient evidence in the record to support the finding or inference that the instruction permits. (*People v. Hannon* (1977) 19 Cal.3d 588, 597-598.) The court is not obliged to instruct on a lesser included offense when there

⁴ Defendant argues there was evidence suggesting Pablo had a gun, citing anonymous calls to the police, a letter by defendant, and "common knowledge" that drug dealers are often armed. None of this evidence, under the substantial evidence standard, counteracts the evidence supporting the jury's finding that defendant intentionally discharged a firearm.

is no evidence the offense was less than that charged.

(*People v. Breverman* (1998) 19 Cal.4th 142, 177.)

Defendant again argues insufficient evidence exists for the jury to find the taking element of robbery; therefore, the court erred in failing to instruct on attempted robbery. In support, defendant cites the same evidence with which he challenged the sufficiency of the evidence supporting his robbery conviction: he contends no evidence established he exercised dominion or control over the drugs.

As discussed above, M.L.'s and Pablo's undisputed testimony supported a finding that defendant had the marijuana in his possession during the incident. There was no testimony from which to conclude defendant was only guilty of an attempt. Therefore, the court did not err by failing to instruct the jury on the lesser offense of attempted robbery.

Defense of Accident

Defendant also contends the trial court erred by failing to instruct sua sponte on the defense of accident as to the section 12022.53, subdivision (d) enhancement. According to defendant, there was substantial evidence Pablo was shot accidentally during his struggle with defendant, who relied on the defense of accident at trial.

The trial court must instruct sua sponte on a defense if it appears defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense that is not inconsistent with defendant's theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

During closing argument, defense counsel stated: "This is a robbery, it's a struggle, it's a fight, and a gun discharges. There is no evidence of the intent here at all, folks. This is an unfortunate accident, and a sad set of circumstances. [¶] And, in fact, the Court will instruct you on this count that the defendant is not guilty of attempted murder . . . if he acted without the intent required for that crime, but acted instead accidentally. . . . I suggest to you, ladies and gentlemen, there is reasonable doubt as to how the firearm was fired and who shot it. . . . [¶] . . . [¶] . . . When some drug dealer intervenes in a robbery, starts struggling over a weapon and is accidentally shot, you, ladies and gentlemen, cannot return a verdict of attempted murder"

As for the attempted murder count, the court instructed: "The defendant is not guilty of attempted murder if he acted without the intent required for that crime, but acted instead accidentally. You may not find him guilty of attempted murder unless you're convinced beyond a reasonable doubt that he acted with the required intent."

Defendant relied on the defense of accident, and the court erred in failing to instruct sua sponte on accident as to the firearm enhancement. However, we do not reverse if we determine the error was harmless. The erroneous failure to instruct on a defense is harmless if other instructions adequately guide the jury in reaching determinations on those issues that would have been presented to the jury by the omitted instruction.

(*People v. Jones* (1991) 234 Cal.App.3d 1303, 1314 (*Jones*).)

The court instructed the jurors that they were only to determine defendant's guilt of the section 12022.53, subdivision (d) enhancements if they found him guilty of attempted murder or robbery. The jury found defendant guilty of robbery but was unable to reach a decision on the attempted murder charge.

As to the robbery charge, the trial court instructed the jury, and defense counsel reiterated, that to prove the section 12022.53, subdivision (d) enhancement the prosecution had to prove defendant personally discharged a firearm during the crime, defendant intended to discharge the firearm, and the act caused great bodily injury. The court also instructed that the crimes and allegations "require proof of the union, or joint operation, of act and wrongful intent."

In addition to instructing that to find the enhancement true the jury must find defendant intentionally fired the gun, the court also instructed that if the jurors had a reasonable doubt they must find the allegation not to be true. These instructions informed the jury that they must find defendant intentionally, not accidentally, fired the gun, wounding Pablo.

Defendant argues these instructions do not eliminate the prejudice, since "the jury was instructed that the accident defense applied only to Count 1, it was essentially instructed that the defense was not applicable to any other charged offense or enhancement." We disagree.

In *Jones*, the trial court failed to instruct on the defense of accident or misfortune in connection with an attempted murder

charge. However, the appellate court found the error harmless, since the court did instruct the jury that it had to find the attempted murder was willful, deliberate, and premeditated, which the jury so found. The court reasoned: "Given the above findings by the jury, it is clear, beyond credible argument, that the jury necessarily rejected the evidence adduced at trial that would have supported a finding to the effect that defendant's 'accident and misfortune' defense . . . was valid, thus implicitly resolving the question of that defense adversely to defendant. Consequently, the trial court's failure to instruct sua sponte on that defense was harmless beyond a reasonable doubt." (*Jones, supra*, 234 Cal.App.3d at pp. 1315-1316.)

Similarly, here, the court instructed the jury that it had to find defendant intentionally fired the gun to find the enhancement true as to the attempted murder count, ruling out any finding that the gun discharged accidentally. A reasonable juror would have understood that the exact same enhancement as to the robbery count required the exact same finding: intentional discharge of a firearm causing great bodily injury. This is the express finding the jury made in finding the allegation true. We find the court's failure to instruct as to the accident defense on the allegation harmless error.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a related claim, defendant argues counsel performed ineffectively in failing to request jury instructions on the

lesser included offense of attempted robbery or on the defense of accident.

To establish ineffective assistance of counsel, a defendant must show counsel's performance was deficient and fell below an objective standard of reasonableness, and it is reasonably probable that a more favorable result would have been reached absent deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674].) A reasonable probability is a "probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

Since we find the court had no sua sponte duty to instruct on the lesser included offense of attempted robbery, counsel did not perform ineffectively in failing to request the instruction. As for counsel's failure to request an accident instruction in conjunction with the section 12022.53, subdivision (d) allegation, we found the trial court's error harmless. Therefore, any request by defense counsel would not have changed the outcome, and the lack of such a request did not constitute ineffective assistance.

REQUEST TO STRIKE GANG ENHANCEMENT

Defendant contends the trial court abused its discretion by declining defense counsel's request to strike the gang enhancement in the interest of justice. In count 5, defendant was convicted of attempting to dissuade a witness, and the jury found true the section 186.22, subdivision (b) gang enhancement.

Background

The offense of attempting to dissuade a witness, charged in count 5, is punishable as either a misdemeanor or a felony.

(§§ 17, 18, 136.1, subd. (a).) However, when there is a gang enhancement attached to the offense, the statutorily mandated punishment is seven years to life. (§ 186.22, subd. (b)(4)(C).)

Defense counsel argued the seven-years-to-life sentence on count 5 violated the constitutional prohibition against cruel and unusual punishment and asked the court to strike the gang enhancement. According to defense counsel, the seven-years-to-life sentence was disproportionate when considering the circumstances underlying the attempt to dissuade a witness charge.

During the hearing, defense counsel characterized defendant's letter to his mother as merely an ineffectual attempt to dissuade a witness that harmed no one, either physically or psychologically, since the threats were not communicated to anyone else. Counsel also argued defendant's youth -- he was 20 at the time of the robbery -- was a factor in support of striking the enhancement.

The court considered the request and determined: "As far as the conviction for dissuading a witness with gang purposes attached, it's not so much whether the attempt to keep those other people from testifying was successful, the legislature says it's seven years to life because any time gang activity takes place in a criminal fashion, it needs to be punished more strongly than if it happened outside of gang activity. [¶] And

when you're talking about a gang getting together to intimidate people so they won't testify anymore, that is especially egregious. And, you know, it takes you back to the days of Al Capone in Chicago, it takes you back to the problems with organized crime back in New York in the 60's, and it takes you to California where we have gang problems up and down the state and people are afraid to testify when they get hurt by gang members. And nobody should have to live with that. [¶] So the idea that you get a seven-year-to-life sentence because the gang is trying to interfere with society being able to address these things in the court system doesn't seem that far out of line. Certainly not an Eighth Amendment issue. The legislature has made its decision that it's seven years to life. I didn't make that decision, they did. But I have a conviction here where that sentencing applies. So the Court will not be striking anything under an Eighth Amendment analysis."

Discussion

Section 186.22, subdivision (g) grants the trial court discretion to strike a gang enhancement "in an unusual case where the interests of justice would best be served" The considerations for determining whether to strike a gang enhancement are identical to the considerations in determining whether to strike a prior conviction allegation. (*People v. Hernandez* (2000) 22 Cal.4th 512, 523.) The court considers whether the circumstances of the offense and the defendant's background take the case outside the spirit of the sentencing statute. (*People v. Williams* (1998) 17 Cal.4th 148, 160-161.)

Defendant contends the court's statements at sentencing illustrate that the court failed to consider all relevant sentencing factors and included irrelevant comments about organized crime. Therefore, the court's decision not to strike the allegation exceeded the bounds of reason.

We disagree. The court noted it had received letters very supportive of defendant but pointed out these people might not have seen his criminal side. The court considered defendant's offense and found that his efforts, albeit futile, to have fellow gang members assist him in silencing witnesses are precisely the type of actions the gang enhancement was designed to address. The court's comments about organized crime merely explained the reasoning behind gang enhancements. We find the court properly exercised its discretion, and the resulting sentence was neither cruel nor unusual given the circumstances.

AMENDMENT OF THE INFORMATION TO ALLEGE ENHANCEMENTS

Finally, defendant argues the trial court violated his right to a fair trial and due process by imposing an unauthorized sentence for the section 12022.53, subdivision (d) enhancement as to count 2.

Background

The information charged defendant with attempted murder in count 1 and second degree robbery in count 2. A section 12022.53, subdivision (d) enhancement was alleged only as to count 1.

The jury was given verdict forms for a section 12022.53, subdivision (d) enhancement for both counts 1 and 2. In

addition, the court instructed the jury that the section 12022.53, subdivision (d) enhancement applied to both counts 1 and 2.

The jury was unable to reach a verdict on the attempted murder charge in count 1 but found defendant guilty of robbery in count 2. The jury also found the section 12022.53, subdivision (d) enhancement true as to that count. The court discharged the jury.

In its sentencing memorandum, defense counsel argued due process should prevent the court from imposing a term of 25 years to life on the section 12022.53, subdivision (d) enhancement in count 2 because it was an uncharged enhancement. Defense counsel noted the verdict form was titled "Special Finding Case Enhancement 2b," and it was a count enhancement, not a case enhancement.

The prosecution requested that the court sentence defendant on the section 12022.53 enhancement or, in the alternative, allow the prosecution to amend the information to allege the enhancement as to count 2. The prosecution argued its failure to plead the enhancement did not bar the court from imposing a sentence on that allegation. In addition, the prosecution cited section 1009, arguing the court could allow amendment of the information at any stage of the proceedings.

The court found the section 12022.53, subdivision (d) enhancement "was adequately pled, presented, argued so that it will still apply to Count 2." The court ordered the information amended to add the enhancement to count 2.

Discussion

On appeal, defendant harkens back to authority he relied on in the trial court in challenging the prosecution's amendment of the information to allege the enhancement as to count 2. In *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), the defendant was charged with sex crimes against two victims. To obtain a 25-years-to-life sentence for one qualifying crime against each victim, the prosecution alleged two circumstances under the "three strikes" law, section 667.61, subdivision (e). As to one victim, the prosecution alleged the use of a firearm and kidnapping. (§§ 12022.5, subd. (a), 667.61, subd. (e)(1) & (4).) As to the other victim, the prosecution alleged use of a firearm and tying or binding the victim. (§ 667.61, subd. (e)(4) & (6).) (*Mancebo*, at pp. 740, 742-743.) As a separate enhancement in each crime, the prosecution also alleged personal use of a firearm under section 12022.5, subdivision (a). (*Mancebo*, at p. 740.)

The jury found the one strike circumstance and the alleged firearm use enhancements to be true. At the sentencing hearing the trial court realized it could not consider the same firearm use in each count both as a circumstance to impose a one strike sentence and to increase the defendant's sentence under section 12022.5. To support the one strike sentence, the court substituted the circumstance that the defendant was convicted of offenses against more than one victim. The information had not alleged this circumstance. (*Mancebo*, *supra*, 27 Cal.4th at pp. 738-739.)

The Supreme Court found the trial court could not substitute the multiple victim circumstance for the gun use circumstance as a means of imposing the one strike sentence. The court noted that former subdivision (i) of section 667.61 provides that for "the penalties provided in this section to apply, the existence of any fact required under subdivision . . . (e) *shall be alleged in the accusatory pleading* and either admitted by the defendant in open court or found to be true by the trier of fact.'" (*Mancebo, supra*, 27 Cal.4th at p. 743.) Because the information failed to allege a multiple victim circumstance under section 667.61, subdivision (e)(5), the court held that "[s]ubstitution of that unpleaded circumstance for the first time at sentencing as a basis for imposing the indeterminate terms violated the explicit pleading provisions of the One Strike law." (*Mancebo*, at p. 743.)

The court rejected the argument that the multiple victim circumstance was charged even though not expressly stated, because the defendant was charged with committing qualifying crimes against more than one victim. The court found that the one strike law requires not merely an allegation of the existence of any fact underlying the section 667.61, subdivision (e) circumstances, but that the People must plead and prove the circumstances specified in subdivision (e). (*Mancebo, supra*, 27 Cal.4th at pp. 744-745.)

The court in *Mancebo* observed: "[N]o factual allegation in the information or pleading in the statutory language informed

defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) and use the circumstance of gun use to secure additional enhancements under section 12022.5[, subdivision] (a)." (*Mancebo, supra*, 27 Cal.4th at p. 745.)

The following year, in *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), the appellate court reached a different result under circumstances similar to those in the present case. In *Riva*, the information alleged a section 12022.53, subdivision (d) enhancement with respect to two counts that charged the defendant with voluntary manslaughter and assault, but not with respect to a count of shooting at an occupied vehicle. The verdict forms asked the jury to determine the truth of the enhancement as to all three counts. The defendant did not object and the jury found the allegation true as to all three counts. The trial court imposed the enhancement on the count as to which it had not been previously alleged. (*Riva*, at pp. 1000-1001.)

The appellate court affirmed, finding no violation of section 12022.53, subdivision (j). Subdivision (j) provides, in part, "For the penalties in this section to apply, the existence of any fact required . . . shall be alleged in the accusatory

pleading and either admitted by the defendant in open court or found to be true by the trier of fact."

The *Riva* court considered section 12022.53, subdivision (j) and found it "only requires the facts necessary to sustain the enhancement be alleged in the information; it does not say where in the information those facts must be alleged or that they must be alleged in connection with a particular count in order to apply to that count. [Fn. omitted.] In the present case the prosecution complied with the literal language of the statute by alleging the enhancement in the information as to the charges of attempted voluntary manslaughter and assault." (*Riva, supra*, 112 Cal.App.4th at p. 1001.)

In addition, the court in *Riva* distinguished *Mancebo*. In *Riva*, the prosecution complied with section 12022.53, subdivision (j) by pleading the enhancement in other counts, placing the defendant on notice that he was being charged with the enhancement. Unlike sections 12022 and 12022.5, section 12022.53 did not require a section 12022.53 enhancement be specifically pleaded as to each count. In addition, the court reasoned the failure to plead the enhancement as to one count did not abrogate the defendant's ability to challenge the factual basis of the enhancement. The defendant was on notice from the allegation of the enhancement as to the other counts that he had to defend against the allegation that he intentionally fired a firearm and proximately caused great bodily injury. (*Riva, supra*, 112 Cal.App.4th at pp. 1002-1003.)

In the present case, the information charged defendant with personal discharge of a firearm under section 12022.53, subdivision (d) as to the attempted murder count. As in *Riva*, the information put defendant on notice that he faced an allegation that he personally and intentionally discharged a firearm.

However, defendant argues that the jury's inability to reach a decision on the attempted murder allegation distinguishes it from the factual scenario in *Riva*. In *Riva* the jury convicted the defendant on all three counts and found the three section 12022.53 allegations to be true.

Riva turned on notice, not on the fact that the jury convicted on all three counts. In the present case, defendant was put on notice of the necessity to defend against an allegation of intentional discharge of a firearm; the jury's failure to convict on the attempted murder charge does not diminish or obviate this notice.

Defendant also points out the verdict form for the section 12022.53, subdivision (d) enhancement in count 2 is entitled "Special Finding Case Enhancement 2b," while the verdict form for the enhancement in count 1 is entitled "Special Finding Count Enhancement 1b." However, defendant fails to explain why a subtle difference in labels undermines the notice provided by the enhancement in count 1.

Defendant argues the court did not include the section 12022.53, subdivision (d) enhancement as to count 2 in the group of charges and enhancements the court included in its

instructions on specific intent. Defendant is correct, but the court also instructed that the "specific intent required to prove the allegation of Intentional and Personal Discharge of Firearm Causing Great Bodily Injury is the intent to discharge a firearm." We presume the jury understood the court was instructing it that specific intent was required for *any* allegation of intentional discharge of a firearm.

Since defendant received notice of the allegation, we find the trial court did not err in allowing the prosecution to amend the information to allege a section 12022.53, subdivision (d) enhancement as to count 2.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

MAURO, J.

HOCH, J.